

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CORRINA J. COOPER
Claimant

VS.

BARTLETT NUCLEAR, INC.
Respondent

AND

AMERICAN HOME ASSURANCE
Insurance Carrier

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Docket No. 1,033,454

ORDER

Respondent appeals the May 25, 2007 Order For Compensation and the June 25, 2007 Amended Order of Administrative Law Judge Brad E. Avery. Claimant was awarded benefits in the form of temporary total disability compensation (TTD), temporary partial disability compensation (TPD), and medical treatment with Dr. James Ransom, Dr. Doty and Jeanne Frieman, Ph.D.

Claimant appeared by her attorney, Roger D. Fincher of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Michael R. Kauphusman of Overland Park, Kansas.

The Appeals Board (Board) adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the Preliminary Hearing transcript of May 24, 2007, with the attached exhibits; and the documents of record filed in this matter.

ISSUES

1. Did the ALJ err in awarding TTD and TPD benefits to claimant? Respondent argues claimant was terminated from her job when the job ended. The termination had nothing to do with claimant's work-related injury. Claimant argues the Board does not have

jurisdiction to consider these issues on appeal from a preliminary hearing.

2. Did the ALJ exceed his jurisdiction in authorizing psychological treatment for claimant absent a seven-day demand letter requesting the same be authorized? Respondent objects to the treatment being authorized, arguing claimant failed to request psychological treatment in the seven-day demand letter which preceded the preliminary hearing. Claimant argues the Board does not have jurisdiction to consider this issue on appeal from a preliminary hearing. In the alternative, claimant argues the appropriate request for benefits was presented in the seven-day demand letter.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the Order For Compensation and the Amended Order should remain in full force and effect, and the appeal of respondent should be dismissed.

Claimant worked for respondent at its Wolf Creek facility, when, during the night shift on October 30 to 31, 2006, she was exposed to a hydrogen peroxide solution. Claimant began noticing a burning sensation in her throat and began experiencing difficulty breathing. She received on-site medical treatment and returned for the remainder of her shift. The next morning, claimant went to her family doctor, Donald N. Braun, M.D. She received conservative care and returned to work. Claimant's employment with respondent ended on November 10, 2006, when the job concluded. Claimant's termination was not connected to her work-related injury.

Claimant was referred by her attorney to psychologist Jeanne Frieman, Ph.D., on January 31, 2007. Claimant was diagnosed with depression, posttraumatic stress distress disorder and obsessive-compulsive disorder, and she was experiencing panic attacks. Claimant was referred by respondent to board certified pulmonary and critical care specialist Gerald R. Kerby, M.D., at the University of Kansas Medical Center. Claimant was diagnosed with restrictive ventilatory impairment, impaired diffusing capacity, and bronchial hyperactivity.

The E-1, Application For Hearing, filed by claimant on March 6, 2007, lists numerous injuries or diseases, including "psychological". Claimant served respondent with a notice of intent letter which was filed with the Division of Workers Compensation on March 12, 2007. The letter noted that claimant had been seen by "Dr. Donald Braun, KU Med

Center physicians, and Jeanne Frieman, Ph.D.”¹ The letter noted a need for a change of physician, as “treatment with these physicians is unsatisfactory”.²

At the May 24, 2007 preliminary hearing, respondent objected to claimant’s request for psychological care, arguing that psychological care was not addressed in the seven-day demand letter. Also at the preliminary hearing, the January 31, 2007 report of Dr. Frieman was admitted without objection.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant’s burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.³

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.⁴

K.S.A. 44-534a(a)(1) states in part,

After an application for a hearing has been filed pursuant to K.S.A. 44-534 and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing.⁵

¹ P.H. Trans., Cl. Ex. 6.

² *Id.*

³ K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

⁴ *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

⁵ K.S.A. 44-534a(a)(1).

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?⁶

Respondent argues the ALJ exceeded his jurisdiction when TTD and TPD were ordered as a result of the preliminary hearing. The ALJ has the jurisdiction to order TTD and TPD from a preliminary hearing, pursuant to K.S.A. 44-534a. The Board does not have the jurisdiction to consider those issues on appeal. Respondent's appeal of those issues is dismissed.

Respondent also objects to the award of psychological treatment, contending claimant failed to raise the issue in her seven-day demand letter. If the ALJ violated the statutory requirements of K.S.A. 44-534a(a)(1), he would have exceeded his jurisdiction. The Board will consider this issue on appeal. Here, claimant's seven-day demand letter discusses the fact that Dr. Frieman is one of claimant's treating physicians. Dr. Frieman is a psychologist, treating claimant's psychological problems stemming from the work-related accident. As claimant's seven-day demand letter specifically discusses a change of physician, as "treatment with these physicians is unsatisfactory", this Board Member finds the issue of ongoing psychological treatment was included in the seven-day demand letter sufficient to put respondent on notice of the requested change. Therefore, the ALJ's determination of the need for ongoing medical treatment, including psychological treatment, was within his jurisdiction and is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

⁶ K.S.A. 44-534a(a)(2).

⁷ K.S.A. 44-534a.

CONCLUSIONS

Respondent's appeal of the ALJ's award of TTD and TPD should be and is dismissed. The award of ongoing medical treatment, including psychological treatment, is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order For Compensation dated May 25, 2007, and the Amended Order dated June 25, 2007, of Administrative Law Judge Brad E. Avery are affirmed.

IT IS SO ORDERED.

Dated this ____ day of August, 2007.

BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
Michael R. Kauphusman, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge